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Richard Moon

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Abstract

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Keywords

Canada. Canadian Charter of Rights and Freedoms; Discrimination--Law and legislation; Canada

DISCRIMINATION AND ITS JUSTIFICATION: COPING WITH EQUALITY RIGHTS UNDER THE CHARTER*

BY RICHARD MOON**

The article examines and appraises conventional methods of interpreting the section 15 equality rights including a comparision of equality rights under the American Constitution. It determines that the most suitable interpretation is one which prohibits "constructive discrimination." Further, the analysis of section 15 finds a built-in limitation – the right against invidious discrimination – making recourse to section 1 unnecessary. But review of constructive discrimination and its justification is constrained by the adjudicative model and the state action doctrine. In the final analysis, the article challenges us to rethink our classic liberal conceptions of equality by looking less at invidious states action and more at the equality of result – yet accepting that the courts are a limited forum.

**Richard Moon, Assistant Professor, Faculty of Law, University of Windsor. Robert Charney was kind enough to comment on a draft of this paper.

I. INTRODUCTION

In the most recent edition of his constitutional law text, Professor Peter Hogg sets out the steps he believes a judge should follow when deciding whether a particular law violates section 15 of the *Charter*.[1]

When faced with the claim that a particular piece of legislation is contrary to the equality provision, a judge must first look to see if the law makes a distinction on any basis — extending benefits to, or imposing restrictions on, some but not all individuals. Hogg believes that the equality provision guarantees the universal application of laws. If a law differentiates between individuals in any way and on any ground, then it violates section 15 and, therefore, *prima facie* violates the *Charter*.[2]

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[1] P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 800-801.

[2] *Ibid.*

According to Hogg, once a violation of section 15 is found, the judge must look to section 1 of the *Charter* and decide whether the limitation on the right to equality is "reasonable" and "demonstrably justified in a free and democratic society." The classification used in the legislation must be "rationally" related to a valid purpose, and the purpose must be important enough to justify deviation from the principle of universal application. If differential treatment is necessary for the achievement of the law's goal, then the judge must balance the significance of the law's goal against the unfairness of the law's differential treatment.

Most laws draw lines and use classifications, and so, if Hogg's view of section 15 is accepted, most laws will be found to violate the section. Whenever a law distinguishes between one group and another (whether between rich and poor or between margarine producers and butter producers) for any reason and in any circumstance, the onus will shift to the party seeking to uphold the law, usually the state, to show that the distinction drawn is "reasonable" and "demonstrably justified in a free and democratic society."

What standard of justification is this? Must the state show that the distinction is necessary to further a compelling state interest; a standard that in the United States has been called "strict scrutiny?"[3] Hogg accepts that strict scrutiny will sometimes be the appropriate standard of justification under section 1. The state must show that the law's purpose is necessary and cannot be achieved without using the particular classification. But at other times, says Hogg, the burden to be met will be very slight; so long as there is some reason for the distinction, the standard will be met and the distinction justified.[4]

Why should there be this variation in the standard of justification? Nothing in section 1 suggests that sometimes, only a very significant public interest will justify a limitation on a right

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[3] As will be discussed below, strict scrutiny is ordinarily regarded as a test for determining the presence of prejudice in the legislative process. Strict scrutiny involves an assessment of both the means and ends of a law.

[4] *Supra*, note 1 at 799.

while at other times, a minor interest will be sufficient.[5] It is apparent that for Hogg not all violations of section 15 are the same. Some deviations from the principle of universal application are more serious than others and therefore require greater justification. Indeed, if sometimes any reason will be sufficient to justify differential treatment, then it seems that the universal application of the law is not a right at all. Ordinarily, something more than "rationality" is required of a limitation on a fundamental human right.[6]

Hogg puts forward the principle of universal application as a simple and straightforward explanation of the equality provision. But clearly his explanation is neither of these things. A complex theory of equality is hidden here. Hogg has shifted the focus of the debate concerning the meaning and scope of the right to equality from section 15, to section 1, the provision which allows limits to be placed on *Charter* rights. The controversy about the meaning of the terms "equality" and "discrimination" is concealed behind the general language of section 1.

Hogg has come to the conclusion that section 15 guarantees the universal application of laws because he believes that any other interpretation of the section would leave no role for section 1. His reasoning is as follows. Section 15 guarantees equality without discrimination. Discrimination could have one of two meanings. It could mean differential treatment of any and every kind. Or it could mean differential treatment which is "invidious" – for example, differential treatment which cannot be justified because it was made for an improper or inadequate reason. Hogg observes that if the latter and pejorative meaning of the term were adopted, then there would be no need to look to section 1 once a violation of section 15 had been found; for if it were decided that a classification in a particular law was invidious, then that classification could not possibly be justified under the terms of section 1 (as "reasonable" and "demonstrably justified..."). And, since the drafters of the *Charter* must have intended that section 1 would have a role to play

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[5] See *R.* v. *Oakes* (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200.

[6] *Ibid.*

in *Charter* adjudication, Hogg concludes that the proper meaning of "discrimination" must be its "neutral" meaning, a differential treatment of any type.

There is, however, no need to accept the premises of Hogg's argument. The term "discrimination" could be interpreted to mean something other than invidious differentiation or differentiation of any and every kind. There is at least one significant intermediate interpretation of the term available to the courts. Section 15 could be interpreted as prohibiting "constructive" discrimination. "Constructive" discrimination occurs when a law has a disproportionate impact on a disadvantaged group and its purpose is not significant enough to justify this impact. Only when a law has a disproportionate impact on a disadvantaged group will the court have to consider whether the law is justified under section 1.[7]

In any event, is it necessary that section 1 have a role to play in decisions concerning the equality provision? Although most rights in the *Charter* are not protected absolutely and are subject to limitation under section 1, the courts have recognized that several *Charter* rights have a limitation built into them. When the court finds that one of these rights, such as the right against unreasonable search and seizure, has been violated, recourse to section 1 is unnecessary.[8] Section 15 could be interpreted as having a limit built into it (a right against invidious discrimination) so that recourse to section 1 is unnecessary. So long as section 1 has a role to play when other *Charter* rights are in issue, the section has a purpose. The section need not have a role in section 15 adjudication.

It appears that Hogg does not really think that the right to "equality" requires that all laws have universal application. He accepts that sometimes differential treatment will clearly be justified, and other times, it will be more controversial. How could it be otherwise? No infringement of a basic human right occurs each time a law makes a distinction. A significant countervailing interest is not needed to override the "wrong" involved in the use of legislative classification. Individuals are not all identical in their

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[7] A more complete discussion of constructive discrimination is provided below.

[8] *R.* v. *Noble* (1984), 16 C.C.C. (3d) 146 at 170, 14 D.L.R. (4th) 216 at 240.

abilities and needs and to treat them identically would make very little sense. The distribution of social resources should reflect the complexity of society and the diversity of its citizenry. A wide variety of legislative distinctions seem quite ordinary and acceptable. Some individuals will be able to use or enjoy certain benefits or opportunities that others will have no need or use for. Indeed, given the different circumstances of individuals, certain laws which are neutral on their face may be unfair and even discriminatory. To require everyone to work on Saturday but not Sunday would be to treat all persons identically but perhaps not "equally."

The use of classification in law is not inherently wrong. Yet we do feel that some classifications are wrong, or, at least, suspect in that they may be used for improper reasons or may have unacceptable consequences. It is this intuition that Hogg draws on when he suggests that it will be appropriate for the courts to use varying standards of justification under section 1, depending on the nature of the classification sought to be justified. However, Hogg's analysis of the interaction of section 15 and section 1 of the *Charter* suppresses difficult questions concerning the meanings of equality and discrimination. In particular, it does not address the issue of whether the right prohibits only intentional discrimination or whether it goes further and prohibits laws which have a disproportionate impact (a detrimental effect) on particular groups of individuals, regardless of the legislator's intention?

The American Supreme Court has stated that the equal protection clause prohibits only intentional discrimination and that the effect of a law on a minority group is relevant only in so far as it may be evidence of an intention to discriminate.[9] It is not yet certain whether Canadian courts will follow the American lead and limit the equality right to a prohibition on intentional discrimination. However, there is reason to believe that Canadian courts will take an expansive view of the right and interpret it as a prohibition on "effects" discrimination.[10] The equality right is not easily confined to

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[9] *Washington* v. *Davis*, 96 S.Ct. 2040 (1976) at 2048.

[10] See *Re Blainey and Ontario Hockey Association et al.* (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (Ont. C.A.) [hereinafter *Blainey*] and *Ontario Human Rights Commission* v. *Simpsons-Sears Limited*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321.

a prohibition of intentional discrimination. Intention to discriminate is difficult to discover. But, more fundamentally, there are difficulties with the idea of discrimination as a conscious effort to disadvantage a particular individual or group. Discrimination seems to operate at an unconscious or irrational level and involves the use of cultural assumptions that are not centered in an individual actor. Generally, the intention to discriminate must be constructed by the courts from social circumstances. Review for intentional discrimination involves the courts in an examination of the means and ends of a law to determine whether the law reflects an intention to discriminate. The step from examination of effects as a test for intentional discrimination to examination of effects as the standard of equality is difficult to avert because of problems surrounding the concept of intention and because the right to equality is understood to have implications for the outcome of laws.

However, I will argue that if the Canadian courts do adopt the view that section 15 of the *Charter* involves a prohibition of effects discrimination, they will have a difficult time defining the scope of the right and enforcing it in a way that does not undermine their institutional legitimacy.[11] Although review for "constructive

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[11] Similar concerns are raised in a recent article by A. Brudner, "What Are Reasonable Limits to Equality Rights?" (1986) 64 Can. B. Rev. 469.

Professor Brudner's response to these "difficulties" is very different from mine. He believes that the courts should apply a "rationality" test to determine whether an act of the state violates the right to equality. According to Professor Brudner, if the courts were to apply a rationality test, properly conceived, they could avoid the varying standards of review followed by the American courts (strict scrutiny) and the intention/effects dichotomy.

I am not convinced that any form of rationality test is a satisfactory answer. Legislative generalizations are not simply correct or incorrect (rational or irrational). Was the internment of the Japanese during World War II irrational? The policy was not totally devoid of reason. Do we not and should we not set a higher standard scrutiny (of means/ends rationality) when we are determining the validity of an act of this sort? We are more demanding because we are more suspicious that prejudice has played a role in the decision (stereotypes about Japanese Canadians and Japanese Americans) or because we are concerned about the disadvantaged position of the particular group.

Professor Brudner refers to the *Feeney* case (see footnote 25), in which the American Supreme Court examined a statute which gave preference to veterans in recruitment for public service employment. He says that "in this context, the use of such criteria conclusively violates the systematic principle of careers open to talents, which principle measures the impartiality of the social distribution of preferred positions." It is unclear to me why a policy which involves giving preference to veterans is "irrational" (at 498). If this preference for hiring veterans did not have a disparate impact on women (because of discrimination in military service), I do not think it would present any problems.

discrimination" does not give full effect to equality of result, even this limited review (of laws which have a disproportionate impact on a disadvantaged group) involves the courts in a potentially open-ended task; an assessment of the effect of the system of laws and an attack on inequality in social status. This partial protection of equality of result will not fit comfortably within the structures of constitutional adjudication. The courts may simply have to "muddle through," striking a difficult balance between the assertion of social justice and the maintenance of a judicial role which is consistent with their position in the Canadian constitutional system.

II. HUMAN EQUALITY

Section 15 guarantees to everyone "equality before and under the law, the equal protection of the law and the equal benefit of the law without discrimination...."[12] It is generally assumed that the inclusion in section 15 of several "equality rights" was a response to the Supreme Court's narrow interpretation of the equality provision in the *Bill of Rights*.[13] The conventional view is that the *Charter* contains a single right to equality which stands as a limit on all forms of governmental action. But even if the various clauses of section 15 are viewed as constituting a single right to equality, they may also be seen as reflecting the complex structure of that right. The various formulations of the right to equality set out in section 15 may represent different dimensions of the right. The appropriateness of a particular formulation will depend upon the context in which the right is invoked.

The right to equality rests upon the abstract principle that human beings are of equal worth. This is not an empirical claim

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However, my response to the difficulties involved in interpreting s. 15 is far less satisfying. As will become apparent, I believe that the courts have no choice but to try and cope with a variety of tensions.

[12] *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[13] W. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. B. Rev. 242 at 249-50; M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct. L. Rev. 131 at 135.

that all individuals are the same in their natural endowments of character and ability. It is rather an ethical claim to the effect that all individuals, as human beings, are of equal worth, and despite their differences in ability and character, are equally entitled to consideration and respect.[14] A human being is characterized by the capacity to reason, to make moral judgments, to set goals and work towards them, and to care about, and form relationships, with others.

What, then, is involved in treating individuals as worthy of equal concern and consideration? The abstract principle does not require the identical treatment of all individuals. The idea that all individuals ought to be treated identically is expressed in Hogg's claim that all law ought to have universal application. But this principle is inadequate as a formulation of the right to equality and, indeed, as was suggested above, Hogg seems unwilling to embrace it fully. As R.H. Tawney has said:

> [E]quality of provision is not identity of provision. It is to be achieved, not by treating different needs in the same way, but by devoting equal care to ensuring that they are met in the different ways most appropriate to them .... The more anxiously, indeed, a society endeavours to secure equality of consideration for all its members, the greater will be the differentiation of treatment which, when once their common human needs have been met, it accords to the special needs of different groups and individuals among them.[15]

Sometimes the right to equality is expressed in the form of the precept "like cases ought to be treated alike" (also expressed as: those similarly situated ought to be similarly treated).[16] This principle attempts to accommodate the fact that human beings are different, that they have different needs, abilities, and goals. There is no obligation to treat two people who are unalike in a like way but it would be arbitrary and unfair to treat differently two people who are alike. Some account must be taken of the subjects of equality, their particular and different needs and interests.

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[14] R.H. Tawney, *Equality* (London: George Allen & Unwin, 1931) at 47.

[15] *Ibid.* at 51-52.

[16] *Re McDonald and the Queen* (1985), 21 C.C.C. (3d) 330, 21 D.L.R. (4th) 397. See also J. Tussman & J. tenBroek, "The Equal Protection of the Laws" (1949) 37 Cal. L. Rev. 341.

The principle that we ought to treat like cases in a like manner is indisputable but formal.[17] It leaves open the question of when two cases are alike or when two people are similarly situated. It must be supplemented with a theory about "likeness." What sort of difference is relevant or irrelevant when decisions about the treatment of individuals are made? When are people alike and when are they different in a morally relevant sense?

The abstract principle of human equality provides substance for the precept "treat like alike." Each person is a human being and therefore alike in that important respect – in the things they share by virtue of being human. The equality of human beings means that the value or worth of a person does not vary depending on his or her race or sex. Nor does it vary depending on the extent to which he or she is able to develop and exercise his or her human capacities. It is the existence of these capacities, and not the extent of their realization, that is the basis of human value.[18] Intelligence and moral sensitivity are valuable and the state should do its best to create an environment in which these capacities may develop and flourish, but the life of an intelligent, morally sensitive person is not of greater intrinsic worth than the life of another less intelligent or less moral person.

III. IRRATIONALITY AND PREJUDICE

Clearly it is wrong to treat two individuals differently when there is no reason for differentiating between them. This much follows from the formal principle that like cases ought to be treated alike.[19] The right to equality forbids the making of arbitrary distinctions. Human beings are of equal worth and so ought to be treated alike unless there is some reason for distinguishing between

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[17] H.L.A. Hart, *The Concept of Law* (London: Oxford University Press, 1961) at 155.

[18] S. Lukes, *Individualism* (Oxford: Basil Blackwell, 1985) at 126.
No doubt contributing to this attitude is a recognition that the development of an individual's capacities is dependent upon his or her social environment.

[19] B. Williams, "The Ideal of Equality" in H. Bedau, ed., *Justice and Equality* (Englewood Cliffs, N.J.: Prentice-Hall, 1971) 116 at 119.

them. This is the element of truth in Hogg's claim that laws should have universal application. But the wrong that occurs when arbitrary distinctions are made is not the failure to treat all people identically, a "wrong" which may sometimes be overridden by a competing interest which requires differential treatment. Rather, the wrong is the differential treatment of people for no reason. The irrationality of the distinction is the basis of the wrong. To treat two people differently without reason is to fail to treat them as persons of equal worth.

Concern for the rationality of legislative decision making underlies the test of minimal scrutiny employed by the American courts in their review of non-suspect legislative classifications under the *Fourteenth Amendment*.[20] Minimal scrutiny involves the examination of a legislative classification to ensure that it advances a sensible purpose and that it is neither (unnecessarily) over-inclusive nor under-inclusive as a means to the law's proper ends. A non-suspect classification will be upheld if there is "a state of facts that reasonably can be conceived to constitute a distinction or difference in state policy...."[21] The courts, however, very seldom strike down legislation on the basis of this minimal scrutiny, for there is almost always some reason to explain the use of a particular legal classification.

Not just any reason, though, will justify differential treatment of individuals. From the claim of equal human worth, it follows that a certain kind of reason will not justify differential treatment: no one should be treated differently because he or she is thought to be intrinsically more or less worthy than others. This sort of reason is regarded as "illegitimate" or "irrelevant" and is excluded by the right to equality.

The view that the members of a particular class, race, or religion are less worthy or less "human" than others is sometimes referred to as prejudice and actions based on this view are sometimes referred to as discrimination. Prejudice is generally

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[20] In American jurisprudence, suspect classifications include race and nationality. The use of these classifications is subject to strict scrutiny. Other classifications are not suspect and so are subject to a lesser standard of scrutiny (intermediate or minimal).

[21] *Allied Stores of Ohio* v. *Bowers Tax Commission of Ohio* (1959), 358 U.S. 522 at 530.

expressed through the use of stereotypes. Stereotyping involves the attribution of a particular trait to the members of a group. Sometimes the attribution makes sense in that the attributed characteristic is common among the group's members. But other times, the attribution has no basis whatsoever because the trait is no more common among the group's members than it is among the general population.

The use of stereotypes as an expression of prejudice usually involves a claim that the members of a particular group share a certain undesirable characteristic; a characteristic relevant in the distribution of social burdens and benefits – for example, intelligence, responsibility, and strength which are relevant to the performance of certain jobs. The bigot does not argue that the members of certain groups are less worthy because of their skin colour or religion, rather he or she argues that they are less deserving because of certain socially relevant traits which correlate with skin colour or religion. An illegitimate ground of distinction is concealed behind a legitimate ground.[22]

The right to equality is concerned with certain "illegitimate" reasons for action. These reasons, prejudice of various kinds, will not justify the differential treatment of individuals. One person is not "unlike" another merely because he or she is of another race, religion, or class. Unless there is some legitimate reason for treating him or her differently, the principle of equality requires that he or she be treated the same as others. An act which is "motivated" by improper reasons is tainted. Regardless of the "objective" worth of the act, if prejudice has been a factor in the decision-making process leading to it, the right to equality will have been violated. In this sense, the wrong is content-independent. The wrong relates to the reasons or motives for the action, not to the content of the chosen action.

There are many reasons for treating individuals differently which do not involve prejudice. The right to equality does not forbid legislative recognition of the different abilities, interests, and needs of the members of the community. Medical care may appropriately be provided to those who need it rather than to every

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[22] See Williams, *supra*, note 19 at 119.

person equally regardless of their health. Higher education or special skills training may be provided to those who have the interest and ability which allow them to take advantage of it. As long as the particular distinction does not reflect a belief that some members of the community are deserving of greater concern and consideration than others, then it cannot be attacked as a prejudice-based breach of the right to equality.

A. *Intentional Discrimination*

In the United States, the constitutional right to the equal protection of the laws has been interpreted as prohibiting intentional discrimination by the state. The Supreme Court of the United States declared, in *Washington* v. *Davis*, that the equal protection clause was concerned with "purpose or intent" to discriminate.[23] In the Court's view, "the basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[24] Speaking for the majority of the Supreme Court in *Personnel Administrator of Massachusetts* v. *Feeney*, Justice Stewart stated that:

> "Discriminatory purpose" ... implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[25]

The Court has made it clear that the equal protection clause is concerned with the motive or purpose behind the law and not with the law's effect.

However, the American decisions do not clearly or consistently equate intentional discrimination with prejudice-based decision making. At times, the American courts seemed to say that the objectionable intention is not the intention to harm a particular

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[23] *Supra*, note 9.

[24] *Ibid.* at 2048.

[25] *Personnel Administrator of Massachusetts* v. *Feeney* (1979), 99 S.Ct. 2282 at 2296 [hereinafter *Feeney*].

group or to treat some groups as less worthy or deserving (to act out of prejudice), but is rather the intention to employ a particular classification, no more than the intention to use race, gender, or religion as legislative categories.[26]

There are, however, good reasons to reject the view that the right to equality forbids the simple intention to use certain legislative categories (discrimination in the neutral sense). The equal protection clause in the American *Bill of Rights* and section 15 of the *Charter of Rights* are both open-ended; they do not limit their protection to particular groups. Section 15 specifically names certain classifications but clearly states that its protection is not limited to those classifications. If section 15 is interpreted as prohibiting the intention to distinguish on the basis of a protected classification, then the use of any classification is forbidden. Any law which distinguishes one group of persons from another group involves the intention to "discriminate" on the basis of group membership.

The American courts have not interpreted the *Fourteenth Amendment* as forbidding every use of classification. They have interpreted the *Fourteenth Amendment* as prohibiting the intention to differentiate on certain grounds only, grounds such as race and gender.[27] But this restriction on the scope of the right begs the question, why show concern for only these classifications? If any sense is to be made of the intention-based account of the right to equality, then the forbidden intention must be the intention to disadvantage a particular group because its members are regarded as intrinsically less worthy or deserving, and not the mere intention to distinguish on a particular ground. The court's concern for racial, religious, and other groups is sensible only if a prejudice-based view of the right is adopted.

The language of section 15 in the *Canadian Charter of Rights and Freedoms* may be taken as adopting the intention-based view of the right to equality. The phrase "the equal protection of the laws" used in section 15 is borrowed from the American *Fourteenth Amendment*. As well, the specific mention in section 15 of groups

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[26] *Regents of the University of California* v. *Bakke* (1978), 98 S.Ct. 2733 [hereinafter *Bakke*].

[27] Of course, minimal scrutiny applies to all laws; a basic rationality test.

that have historically been the victims of prejudice, evokes the idea of "suspect classifications" and the process of "strict scrutiny," both of which are central to the judicial protection against prejudice-based decision making in the United States.

There are difficulties with an interpretation of the equality right which requires that the courts determine whether an act of the state has been motivated by prejudice. Legislators seldom admit that prejudice has played a part in their decision. And when prejudice does play a part in a decision, it usually plays only a *part*; one of many factors. Intention to discriminate is difficult to discover and difficult to prove. The burden of proof on the person alleging discrimination is sometimes insurmountable.

Beyond problems of discovery and proof, it has been suggested that there is no such thing as legislative intention. The act of a single administrator can sensibly be said to be motivated by reasons including prejudice, but the act of a collective body, such as a legislature, cannot. The legislature does not have an intention, only its members do and they may support a particular statute for a variety of different and even conflicting reasons.

Without question, the courts play a creative role when they attempt to determine the purpose of a law. But the idea of legislative motivation is certainly not senseless. Laws are capable of interpretation because they are human acts intended to achieve certain goals. Not all legislators will have acted for the same reasons, and their reasons may range from the specific to the general. When the courts interpret a law, they endeavour to articulate the purposes of the legislators when they enacted the law. The creators of a particular law often agree on the general purpose of the law and usually act for the same or similar reasons. A court can identify some of the legislature's reasons for action from the context of the legislation, particularly if the court assumes that the law is the act of a human organization concerned with the public welfare.[28]

However, there is a deeper problem with the idea of intentional discrimination, concerning its "intentional" or "conscious"

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[28] For a recent consideration of the question of intent and interpretation, see R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

character. Discrimination does not generally involve a conscious effort to harm or disadvantage a particular group. Discrimination operates at an unconscious or irrational level and involves a reliance upon various assumptions and beliefs about a group – assumptions which are current in the larger community and have been internalized by the individual actor.

B. *Suspect Classifications and Strict Scrutiny*

As a result of these difficulties, the American courts, when endeavouring to detect prejudice-based discrimination, have relied on "objective" indicators of intention. The courts have focused on the use of particular classifications and the relation of means (the classification used) to ends (the legitimate purposes that may be attributed to the law). When race or religion are used as legal classifications, the courts are suspicious that prejudice has been a consideration in the law-making process. Judicial suspicion is aroused because the members of certain racial and religious groups have traditionally been victims of prejudice and because race and religion are rarely relevant to the achievement of a legitimate social goal. When put in issue before the American courts, these "suspect" classifications have been subjected to "strict scrutiny," while other classifications have been subjected to a lesser standard of review.[29] Strict scrutiny has two aspects. Before the courts will give their consent to a "suspect" classification, they must be convinced that the classification is necessary to achieve the object of the law and that the law's object represents a compelling state interest.[30]

When the legislature makes use of a suspect classification, the courts consider whether the classification is necessary for the achievement of a legitimate social end. If another classification

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[29] A third level of scrutiny – intermediate scrutiny – has emerged recently. See *Craig* v. *Boren* (1976), 97 S.Ct. 451.

[30] To illustrate: A law which prohibits natives from being intoxicated away from the reserve when no such prohibition affects non-natives can only be justified if one accepts certain views about natives. The purpose of the law is not simply to restrict drunkenness; it is to restrict drunkenness among natives. Underlying the law is a paternalistic attitude towards natives; a view that natives are not capable of making decisions when non-natives are capable.

would more efficiently advance the law's legitimate purpose, then it is reasonable to conclude that the legislature has engaged in some unfair stereotyping, drawing on prejudiced attitudes. In looking for some indication that the legislative decision was tainted by prejudice, the courts make a judgment about the utility of the means employed to achieve the chosen end.[31]

The courts also pass judgment on the value of certain ends. Are the (claimed) ends of the law important enough to account for the disadvantageous effect of the law on a particular group? When a law detrimentally affects a group that has traditionally been the victim of prejudice, particularly when a "fundamental interest" is involved, the courts require that the law's purpose be very important. By requiring this, the courts ensure that no part of the law's justification stems from an attitude of prejudice. The courts balance the importance of the law's particular end against the detrimental effect the law has on the particular group. This process allows the courts to judge whether the legislature was willing to sacrifice the interests of the group to the law's end because it had prejudiced views about the group.

The courts also look closely at laws which employ non-suspect classifications but which have a disproportionate impact on groups which historically have been victims of prejudice. Laws of this sort may involve concealed prejudice. The legislators may have passed the law precisely because of the detrimental impact it has on the group. This practice is often referred to as "indirect" discrimination. Indirect discrimination involves an intention to discriminate on the basis of race, religion, or gender; the intention is simply concealed behind neutral criteria.[32]

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[31] G. Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86 Harv. L. Rev. 1 at 21.

[32] "Indirect discrimination" has another sense. It is sometimes used as another term for constructive or effects discrimination. The dual meaning of the term is, I believe, no coincidence.

The use of stereotype or generalization does not necessarily involve prejudice. It is not always possible for the law to provide individualized treatment. Generalizations may be made about non-suspect groups (and perhaps even suspect groups) when there appears to be no other way to achieve a particular social goal. When there is no other way to achieve a legitimate social end, a law which makes an assumption about a group which may be unfair to some of its members can be explained without finding a prejudiced attitude behind it.

C. *Affirmative Action and Discrimination*

Racial and other suspect classifications might be used for reasons other than prejudice. Although race is not usually relevant to the achievement of a legitimate social purpose, there are social goals to which it may be relevant so that its use as a legislative classification can be explained without finding prejudice as a motivating factor. However, the American courts have sometimes said that racial classification is wrongful *per se*. The *Constitution* has been described as "colour-blind."[33] It is said that to justify the "wrong" that occurs when a racial classification is used, there must be a very strong countervailing governmental interest. Perhaps no interest will ever be sufficient to override the prohibition on the use of such classifications.

The constitutional debate in the United States about affirmative action illustrates this uncertainty about the use of racial and other "suspect" classifications. If the courts were only concerned with prejudice, then affirmative action for blacks, women, and other groups would not present constitutional difficulties. The purpose of affirmative action programmes is the advancement of members of a group that has historically been disadvantaged, often because of prejudice. Whatever the value of such programmes, they are a response to prejudice, and not an expression of it.

Yet in the *Bakke* case, the majority of the American Supreme Court approached the question of the constitutionality of an affirmative action programme just as they would the constitutionality of any legislative or administrative use of a racial classification.[34] In the view of Chief Justice Burger and Justices

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As an example, mandatory retirement of judges at a particular age may be unfair to those judges who are quite capable of carrying on their duties. Nevertheless, the nature of the position of judge (and concern for judicial independence) makes individual assessment of a judge's ability to carry on his or her duties inappropriate.

[33] *Plessy* v. *Ferguson* (1896), 163 U.S. 537 at 559 (Harlan J. dissenting).

[34] *Bakke, supra*, note 26 at 2750. In Canada, the problem of affirmative action is avoided by s. 15(2) of the *Charter*.

Stewart, Rehnquist and Stevens, the state was, without exception, prohibited from using racial classifications. Justice Powell, who wrote the deciding judgment, took a slightly different view of the issue. According to Powell, once a racial classification is used, the state must show that its use is necessary to the achievement of a compelling state interest and that there is no other way to achieve that end.[35]

Both of these views confuse the test and the wrong. The wrong is prejudice-based decision making; the use of a suspect classification is evidence of prejudice in the legislative decision-making process. The colour-blind approach has the advantage of simplicity, but is not sufficiently subtle given the present interest in overcoming societal prejudice. A racial classification which benefits a disadvantaged minority group (a group historically subjected to prejudice) ought not to be precluded or even strictly examined and required to advance efficiently a compelling social purpose. Such programmes clearly are not motivated by prejudice which is what the test of strict scrutiny is designed to detect.

D. *The Problem with Intentional Discrimination and the Drift towards Constructive Discrimination*

In a similar way, the occurrence of disproportionate impact (disadvantageous effect) on a particular group is sometimes taken as the standard of equality or non-discrimination and not simply as a test for prejudice in legislative decision making. Certain judicial decisions in the United States have suggested that the right to equality is violated when a law has a disproportionate impact on a disadvantaged group.[36] However, the American Supreme Court has clearly stated that disproportionate impact is not itself wrongful under the *Fourteenth Amendment*.[37]

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[35] *Ibid.* at 2756.

[36] For example, *Swann* v. *Charlotte-Mecklenburg Board of Education* (1971), 91 S.Ct. 1267.

[37] *Washington* v. *Davis*, *supra*, note 9.

The history and language of section 15 lend some support to the view that a violation of the right to equality occurs when a law has a disproportionate impact on the members of a particular group, and the reason for the differential impact is trivial in comparison to the disadvantage it brings. This interpretation of section 15 is suggested by the inclusion of a right to the equal benefit of the law and the specific mention of age and handicap as grounds of discrimination. The elderly and the handicapped are less victims of prejudice than of indifference – indifference to their particular concerns and interests. They are forgotten by the legislator who tends to think only of the "average" person. This interpretation of section 15 although rejected by the American Supreme Court, has some early support in Canadian Courts.[38]

The shift from effects as test to effects as standard is perhaps inevitable given the difficulties faced by an intention-based version of the right to equality. A conception of the right to equality which focuses on intention is confronted not only with the problem of determining intention which involves considerable reliance on objective factors (the assessment of ends and means), but also with the more fundamental problem of the ambiguity which surrounds the concepts of intention and prejudice.

The "exercise" of prejudice (discrimination) seldom involves carefully thought out actions which are performed with the specific intention of disadvantaging a particular group. Generally, discrimination involves a failure to take adequate account of a group's interests rather than a conscious effort to disadvantage the group's members and is the result of a reliance on inaccurate and simplistic generalizations about the group's members. The adoption by an individual of an inaccurate and unfair stereotype concerning a particular group is usually no more than an unreflective internalization of a generally held view, a larger cultural assumption about other groups, and acceptable ways of living and behaving. For instance, prejudice against women usually takes the form of paternalism, the view that women are in need of special protection from the harshness of life. Those who regard women as somehow less capable do not consciously intend to disadvantage women,

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[38] See *supra*, note 10.

although that is generally the effect of their protective actions. A generalization of this sort is unfair because it is simplistic and inaccurate but also because it plays an important part in the systematic subordination of women. Once it is recognized that discrimination is not simply the product of the autonomous will of an individual but stems rather from larger cultural attitudes, it becomes necessary to look at social context in order to identify discrimination and recognize its harmful character, and it becomes clearer that discrimination is pervasive in the community and not simply a discrete and aberrant act.

The transformation of disproportionate impact from test to standard is easily made not just because of problems related to the concepts of intention and prejudice but also because concern with the outcome or substance of laws follows from the idea of human equality. If the courts accept that the right to equality has implications for the results of legislative decision making and not just for the process of decision making, then the prejudice-based account of the right may be left far behind. But to understand disproportionate impact as a violation of the right to equality, we must extend our understanding of the right to include concern for the welfare and status of individuals in the community.

IV. EQUALITY OF RESULT

The right to equality, interpreted as a prohibition of prejudice-based decision making, involves the exclusion of certain reasons for action. The wrong proscribed is an intentional act. It is wrong to intend to treat an individual as less than a full member of the human community. If the state decides to allocate certain benefits or burdens, it cannot distribute them differently among individuals because it considers some individuals to be intrinsically less worthy than others. No positive duties fall upon the state as a consequence of the prohibition of prejudice-based decision making. The state is not required to take any particular action, nor is it prevented from acting provided it does so for proper reasons.

But the principle of human equality has implications for the substance of legislation and not simply for the process of legislative decision making. If all individuals are of equal worth, and if the life

and development of each individual matters and matters equally, then the state should work to advance the interests of each and every one of its citizens. The benefits and burdens of community should be distributed in a way that shows equal concern and consideration for the needs and interests of all. The state does wrong when it ignores for any or for no reason the interests of a certain group of individuals or when it sacrifices the interests of a certain group to the interests of other groups. The state must show concern for the position or status within the community of each individual. "Equality" is then a goal of law and not simply a principle governing the motives of legislators and the reasons for legislative action.

What must the state do to show equal concern and consideration for all its citizens? The content of the state's obligation depends on what we decide gives value to human life – the qualities or capacities which are distinctive to humans. If human beings are valuable because of certain capacities they share – to think, to make moral judgments, to make life plans, to form relationships with others, and to reflect upon their own character, values, and choices – then the right to equality will require that the state make an equal effort to advance these capacities in each individual. Each individual should be given the fullest opportunity to realize his or her capacity for self-development.[39]

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[39] Lukes, *supra*, note 18 at 134.

For the utilitarian, a human being is valuable because he or she is capable of experiencing pain or pleasure or because he or she has desires and purposes and is able to make choices. According to the utilitarian, the proper course for both the individual and the state is to maximize the aggregate of individual utilities – utility referring to pleasure or preference satisfaction, or some other subjective experience. The idea of human equality is expressed in the principle that the utility of each person counts equally in the aggregation process. One person's utility will count no more and no less than another's in the decision as to the proper course of conduct for the individual or the state.

The complaint has been made that the utilitarian method of aggregating utilities may result in a very unequal distribution of social benefits among individuals. If equality enters into the process at the level of aggregation, then the individual may sometimes be sacrificed to the whole. But an element of equality of result may find its way into utilitarian calculation. Bentham, in particular, assumed that the more an individual has of a particular good, the less satisfaction he or she receives from additional units of the good. It is said to follow from this that the maximization of overall satisfaction will occur when goods are equally distributed.

Whether utilitarians support this indirect and contingent right to equality of result or a more direct version of the right (requiring the state to advance the utility of each person equally), the results, equal or aggregative, are to be measured in terms of utility. The

The right to equality requires that individuals be treated as "equals." It does not require that they be made equal – that each person develop to the same level as everyone else so that all persons come to have the same interests and abilities. More particularly, the right to equality cannot justify efforts by the state to reduce the abilities of some individuals to the level of the rest of the population. This is not so much a limit on the right (that we value things which compete or conflict with equality) as part of the larger idea of human worth from which the right to equality springs. Human beings are valuable, individually and equally, because they share certain capacities. The right to equality cannot be separated from this background of human value since the right depends upon this background for its justification and substance. If certain human capacities are valuable, then it follows that the state should encourage their development. The principle of equality simply adds that what is valuable in one is valuable in all, and that the state must try to advance the interests of each and every individual without favouring some at the expense of others.

The requirements of equality are complex. Some things should be made available "equally" (in like amounts); in particular, necessities of life such as food, clothing, and shelter. Other things are more appropriately distributed on an "unequal" basis. Differential treatment may be justified for many reasons, notably, giving certain limited advantages to those who can best take advantage of them (higher education) or have the greatest need for them (medical care), placing certain obligations and giving certain incentives to those most able to perform tasks which benefit the whole community, and rewarding those who have contributed to the community by displaying virtues which should be acknowledged and encouraged.

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difficulties in measuring utility (subjective satisfaction) and comparing the utilities of different individuals are notorious. How is the strength of preferences to be measured and compared?

More importantly, though, is this the sort of equality of result that the state should be seeking to achieve – equality of pleasure or preference satisfaction? Why should we value preferences regardless of what they may be for? It is difficult to accept that the realization of an individual's humanity occurs through the maximization of his or her preference satisfaction and that equality occurs through the equal satisfaction of preferences among the citizens of the political community.

Once we reject the claim that equality is achieved by distributing the same packages of goods to each individual, or that there is a single criterion for measuring and comparing alternative distributions of social resources (for example, equal preference satisfaction), it is apparent that there is no single correct distribution which is discoverable and which satisfies the right to equality. The needs and interests of individuals are many, as are the benefits offered by society. The state can never fully satisfy all needs and interests. Choices and tradeoffs must be made. To add to this complexity, the distribution of social benefits can be achieved through a variety of different schemes, including the free market and various forms of state initiative. In respecting the right to equality, the state has considerable discretion.[40]

But even if there is no one distribution of social benefits and burdens which is precisely equal and therefore required by the right to equality, there are distributions which violate the right. There is a point at which the distribution of benefits and burdens clearly favours the interests of some over others so that it becomes apparent that the state has not given equal consideration to the interests of all individuals. Too often, some individuals or groups are excluded from the opportunities available to develop themselves, to fulfill goals and desires, and to share in the benefits of the community. Inequality may occur even though the law makers do not intend to limit or disadvantage the particular individual or group and even though the laws which govern the distribution have sensible reasons behind them.

For a variety of reasons, the interests of a particular individual or group may be lost sight of in the decision-making process. Law making sometimes reflects cultural assumptions which, although not properly characterized as prejudice, may have a detrimental effect on certain groups and may limit the expression of different lifestyles and cultures. As well, the interests of some individuals are sometimes overlooked in the narrow pursuit of particular goals. Finally, disadvantages tend to accumulate. An individual, who is denied certain educational opportunities, will find him or herself limited in his or her ability to find interesting and

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[40] See generally, M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

meaningful work and excluded from high paying jobs and benefits that depend on purchasing power.

V. CONSTRUCTIVE DISCRIMINATION

Concern for equality of result is expressed in the interpretation of section 15 as a prohibition of "effects" or "constructive" discrimination. "Constructive" discrimination occurs when an act of the state adds to the disadvantage of an already disadvantaged group. According to this interpretation of section 15, if a law has a disproportionate impact on a disadvantaged group, it will *prima facie* violate the *Charter*. Once a *prima facie* violation is found, the court must then consider whether the reasons for the law are significant enough to justify its disadvantageous effect on the group's members. It is not enough that the law is supported by a legitimate reason; that reason must be substantial enough to justify the law's detrimental impact on some individuals. A violation of the *Charter* will be found when the reason for excluding some individuals from the law's benefit is insignificant when compared to the disadvantage they suffer by exclusion.

The focus of review for "constructive" discrimination is on disadvantaged groups. Review for "constructive" discrimination seeks the removal of barriers that limit the opportunity of these groups to participate fully in the benefits of society. The review also focuses on fundamental human interests, such as education, food, shelter, employment, and health care; interests which are basic to the welfare of all, and which must be satisfied if individuals are to have wider opportunities to participate in the community.

The failure of a government to construct public facilities accessible to wheelchairs has a significant impact on a group which already faces many difficulties. A regulation which requires all construction workers to wear hard hats has the effect of excluding Sikhs from employment in construction. A minimum height requirement for entry into the police force indirectly limits the access of women and certain racial groups to this employment. In each of these cases, a particular group which is already disadvantaged in our society is excluded from an important social benefit. Each of these state acts has a sensible purpose behind it and can be explained

without assuming prejudice on the part of the decision makers – the expense of wheelchair ramps (for existing buildings), the safety of hard hats, and the need for strong and physically able policemen or policewomen. The court must decide whether these purposes are important enough to outweigh the disadvantage suffered by the particular group. If these purposes are not considered significant, then the law will amount to constructive discrimination, a failure by the state to take adequate account of the interests of all its citizens.

Whether a law which has a disadvantageous impact can be justified under the *Charter* will depend on a variety of factors, including whether the group is in a subordinate social or economic position (the relative position of Sikhs), whether a fundamental interest is being denied the group members (employment), whether they have other opportunities which compensate for, or at least alleviate, the harshness of the law (access to other employment opportunities), whether the trait which has been the basis for differential treatment is important to the group's identity (turbans and the importance attached to religious freedom and expression), whether the social goal behind differential treatment is important (worker safety), and whether the goal could be achieved by other means (other ways of ensuring worker safety).

Many of the commentators who interpret the equality right as a prohibition of constructive discrimination play down the substantial character of this version of the right. The prohibition of constructive discrimination, they say, is a matter of equality of opportunity and not equality of result.[41] They claim that review for constructive discrimination is concerned with removing the barriers confronting individuals in the competition for social goods rather than with equalizing the outcome of the distribution of social goods. Review for constructive discrimination simply reflects the principle that everyone should be allowed to compete fairly.

But what is involved in making the competition fair? Review for constructive discrimination is concerned with more than the removal of "arbitrary" barriers to competition for benefits. Any barrier that limits the opportunity of a group of individuals to

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[41] R. Abella, *Equality in Employment* (Ottawa: Ministry of Supply and Services, 1984) at 2; C. McCrudden, "Institutional Discrimination" (1982) 2 Oxford J. Leg. Stud. 303; W. Black, "From Intent to Effect: New Standards in Human Rights" (1980) 1 C.H.R.R. C/1.

develop and to participate in society's benefits should be removed unless necessary for some vital social goal. Review for constructive discrimination, then, is not simply concerned with rules of competition which are neutral towards the outcome of the competition. It is concerned with effects and seeks to structure the competition so that it results in a fairer and more balanced distribution of social benefits. Once review becomes concerned not only with "arbitrary" barriers to action (such as prejudice) but also with the opportunities available to individuals to develop fully as human beings and to participate in a variety of social goods, it assumes a positive, results-oriented character. The state is under a duty to work with equal effort to advance the interests of all individuals. It must not advance the interests of some while inhibiting or ignoring the interests of others. Values other than equality must be accommodated but the goal is a form of equality of result.

A. *The Limited Scope of Constructive Discrimination*

Review for constructive discrimination advances a form of equality of result. However, the pursuit of this end is constrained and distorted by the structural and political limits of adjudication. In a legislative democracy, where the primary responsibility for ordering society is thought to lie with the elected branches of government, there should be some limits to judicial review. Some scope should remain for legislative judgment which is not reviewable in the courts. As well, judicial review must be limited because the adjudicative process is designed to deal with discrete wrongs (violations of a defined right) and not with systemic injustice or inequality.

Review for constructive discrimination focuses on the effect of particular laws and the fate of particular groups and does not attempt to restructure the overall distribution of benefits in the community. The focus on state action means that emphasis is placed on the removal of laws which add to the unfairness of the distribution of social benefits rather than on the direct (re)distribution of resources by an interventionist state. As well, even if a law has a disadvantageous effect on a protected group, that

effect will be justified (permitted) if a significant purpose can be attributed to the law. Limited in these ways, review for constructive discrimination appears to be a slight extension of the prejudice-based view of equality. The deep egalitarianism involved in equality of result is avoided. The courts are not called upon to review and revise the complex distribution of benefits and burdens in the community.

Yet even this limited protection of equality of result will not fit comfortably within the boundaries of the adjudicative process. Review for constructive discrimination places a strain on the adjudicative process and the political legitimacy of judicial review.

B. *Disadvantaged Groups*

Review for constructive discrimination tends to focus on the status of certain disadvantaged groups. This focus is appropriate since the requirements of the right to equality are imprecise. There is no one fair, just, and equitable distribution of social benefits. There is simply a range of acceptable — reasonably fair and equal — distributions. The focus on groups, which have historically been less well off, limits judicial intervention in the law-making process to those occasions when the state aggravates the situation of a disadvantaged group. The legislature is not compelled to justify every law that has a disadvantageous effect on one or more individuals. It need only justify laws which add to the disadvantage of an already disadvantaged group — clear breaches of the right to equality.

This focus on disadvantaged groups strengthens the connection between review for constructive discrimination and review for prejudice. Generally, the same groups of individuals are the focus in either type of review — suspect classifications and disadvantaged groups. According to the prejudice-based version of the right, the state is prohibited from intentionally treating an individual as less worthy of concern and consideration than others. Since prejudice is usually aimed at groups of individuals and involves the use of stereotypes, protection against prejudice-based decision making tends to focus on groups. Review for constructive discrimination, however, requires the state to show equal concern

and consideration for the needs and interests of all individuals. Since disadvantage is usually generalized in some way, the courts seek to identify and remedy disadvantage by examining the relative position of groups in the community and preventing the state from aggravating the position of disadvantaged groups.

This connection between review for constructive discrimination and review for prejudice appears to have caused some confusion. Many of the proponents of review for constructive discrimination seem to be concerned only with the relative position of certain groups – groups that have historically been the victims of prejudice.[42] They argue that review for constructive discrimination should ensure that society is structured so that these particular groups have a share of the community's benefits which is equal, or at least proportionate, to the share of other groups. There is no suggestion that all persons should be treated equally by the state, and that the presence of any disadvantaged group in the community is contrary to the equality right. Notably, there is an apparent indifference shown by the proponents of review for constructive discrimination to poverty and to the poor as a group.

It appears that many of those who argue that section 15 should protect against constructive discrimination want to limit its protection to groups such as women, native people, and the handicapped. Yet why should the right to equality, expressed in the restriction of constructive discrimination, be limited to the protection of these groups? It is not simply wrong that a large number of women, native people, or handicapped people are excluded from the benefits society offers; it is wrong that anyone should be excluded. By focusing on the unequal position of these groups, the proponents of review for construction discrimination appear to avoid the full implications of the right to equality. The right appears to be no more than a simple extension of the prohibition of prejudice-based decision making; an extension which trades on the intuition that something wrong has happened when there are few black doctors and women judges.

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[42] O. Fiss, "Groups and the Equal Protection Clause" in M. Cohen, T. Nagel, & T. Scanlon, eds, *Equality and Preferential Treatment* (Princeton: Princeton University Press, 1977) at 84.

The right to equality should protect all who are disadvantaged and not simply those groups that have been the victims of prejudice. The prohibition of constructive discrimination, as it is set out by its leading proponents, simply redraws the lines of inequality. There is no effort to dissolve the class of disadvantaged citizens. All that is sought is a redefinition of the "underclass."[43]

Perhaps it would be simple enough to add the poor to the list of protected groups. However, the addition of the poor to the list of protected groups would underline other problems related to review for constructive discrimination. In particular, it would underline the limits on judicial review represented by the state action doctrine and the adjudicative model.

C. *The Adjudicative Model and the Doctrine of State Action*

The traditional model of constitutional adjudication supports a limited approach to review for inequality. An equality case conducted within the traditional model will focus on a particular law which is the subject of a dispute between a limited number of parties. Constructive discrimination will be found when a law or other act of the state has a disproportionate impact on a disadvantaged group. This focus on the effect of a particular law suggests that a violation of the right to equality occurs as a discrete wrong, as a particular positive act by the state, and that the vindication of the right involves the removal of barriers to equal opportunity erected by the state.

But if the right to equality is concerned with the position or status of individuals or groups in our society (their welfare and their development), then a determination that inequality exists in our community can only be made after the court has considered the effect of the entire legal order on the relative position of the community's members. A violation of the right occurs not as a discrete act but as a general position or status of inequality or disadvantage in society (for example, poverty). The disadvantaged position of groups and individuals is not the result of any one

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[43] A distinction between bloc-regarding equality and individual-regarding equality is made in D. Rae, *Equalities* (Cambridge, Mass: Harvard University Press, 1981) at 39.

particular law. The distribution of social benefits occurs in a variety of ways, as required and permitted by the law. An imbalance or unfairness in the distribution of social benefits is the product of the general social order.

Even if the issue of constructive discrimination arises in the context of a legal action which involves a limited number of parties and focuses on the legitimacy of a particular law, the investigation of the court inevitably takes it beyond a simple examination of the provisions of the particular law and the effect of that law on the particular parties. The courts must assess the position of the group in society: is the group "discrete and insular" or generally in a disadvantaged position in relation to the rest of the community? A decision on this will require the courts to examine the wider social system and the overall distribution of social benefits. A particular law triggers review, but judicial consideration must extend to the general system of laws.

The doctrine of state action places a significant limit on the scope of judicial review. The state action doctrine holds that a constitutional wrong only occurs when the state has taken action – either an act of law-making or an administrative act. The state does not violate a constitutional right if it simply declines to take action, as when it fails to prohibit private discrimination. The courts are not free to embark upon a general assessment of the social order, correcting omissions in the law and excesses in private sector activity. Before the courts may intervene, there must be some act by the state which can be attacked as contrary to the right to equality.

In the United States, the doctrine of state action has had a troubled existence.[44] Dissatisfaction with the doctrine has usually focused on the problem of private acts of discrimination. If it is wrong for the state to make decisions for reasons of prejudice, then it is also wrong for a private citizen to do so, particularly since so many social goods are distributed through the market. The state action doctrine may be enlarged (or perhaps avoided) in one of two ways: the courts may find that a particular actor should be

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[44] C. Black, "Forward: State Action, Equal Protection, and California's Proposition 14" (1967) 81 Harv. L. Rev. 69.

considered a state actor or they may find that the state has itself discriminated by permitting a private actor to discriminate.[45]

In the context of review for constructive discrimination, dissatisfaction with the doctrine of state action focuses not on the failure to prohibit acts of discrimination in the private sector, but instead on the requirement of action itself, state, or otherwise. Equality of result is concerned with the relative position of individuals in the community. Inequality occurs not as a particular "positive" act of the state (for example, an act motivated by improper considerations), but as an unfair distribution of social benefits or a position of social and economic disadvantage. Inequality is as much the result of a failure by the state to act, as it is of state action. If the legislature is to respect the right to equality, then it must avoid discrete acts of discrimination and also act positively to ensure that a fair distribution of benefits and burdens is obtained in the community — from the complex system of legislative and private decisions.

Since all private power can be seen to originate with the state (with the social rules that are created and enforced by the state) the state could be seen as responsible for the overall distribution of wealth (and, indeed, for all private actions). But, if the distinction between state acts and omissions were overridden, then little would remain of the state action doctrine. Judicial intervention into the social and economic order would be without limits.[46]

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[45] In *Blainey, supra*, note 10, it appears that the state action was the unequal distribution of protection against private discrimination.

[46] The decision of the Supreme Court of Canada in *Retail, Wholesale and Dept. Store Union, Local 580* v. *Dolphin Delivery* [1986] 2 S.C.R. 576 was released several months after this paper was written. The Supreme Court has now given its backing to a version of the state action doctrine.

For a recent and interesting discussion of the state action doctrine, see H. Lessard, "The Idea of the Private: A Discussion of State Action Doctrine and Separate Sphere Ideology" (1986) 9 Dalhousie L.J. 107.

D. *Justification*

A law will amount to constructive discrimination only if it disadvantages a particular group of individuals without sufficient justification. Once the court finds that a particular law has a disproportionate impact on a disadvantaged group, it must then consider if the law is necessary to the achievement of an important social goal. In passing the law, the legislature may have been aware that the law had disadvantages for a certain group, but decided that this was a necessary price for the achievement of an important goal. All governments are faced with the problem of a wide variety of claims on limited resources. They must make hard choices about the allocation of resources; choices which have far reaching implications. Should the state be required to build ramps for the handicapped in all public buildings? A court cannot answer a question of this sort without considering a variety of contextual factors. The court must consider the impact of "no ramps" on the handicapped. It must also consider the cost of the ramps and recognize that the resources needed to build them will have to come from somewhere; will other services have to be sacrificed? A decision by the court that the legislature must devote resources to a specific project resonates throughout the system of legislative distribution.[47]

Should Sikhs be permitted to do construction work without wearing hard hats? If they are allowed to do this, will the state incur additional health care expenses due to an increased number of injuries? Should the state ensure that other safety precautions are taken so that workers without hard hats will not be more vulnerable to accidents? The adjudicative model appears to cut off from consideration a wide variety of factors that ought to be taken into account in deciding whether a hard hat requirement is justified. The courts must either go well beyond the situation before them or make a decision in an artificial context without considering all the factors that are relevant to such a decision.

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[47] A "polycentric problem" in the language of L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353 at 394.

The failure of the courts to consider the background of state resources and distributive policies will be less of a concern if the courts limit the focus of their review to "fundamental" interests – interests so important, that they ought to be satisfied in spite of the effect this might have on other government programmes (reducing the resources available to the state for other programmes). Of course, if the courts do narrow the scope of review and focus on a limited number of fundamental interests, the equality right will lose much of its comparative quality and will begin to appear as a straightforward guarantee of certain limited welfare rights.

In many circumstances, the toleration of disparate impact need not be regarded as a limitation on the right to equality. The right to equality requires that each individual be given both a fair opportunity to develop as fully as he or she is able and an equal share of the benefits and opportunities of the community. Recognition of the right to equality does not require that other goals or values be disregarded. A law which does not extend benefits to all individuals may be quite consistent with the right. If some individuals cannot benefit from certain goods, there is no reason why those goods should be denied to the rest of the population. For example, the blind are not permitted to drive cars, but there is no reason why this activity should be denied to the seeing public. Although a particular law might not benefit all individuals, that disadvantage may be compensated for by the advantage of another law; for example, the state could establish special transportation facilities for the blind.

However, the issue of justification is complicated because the pursuit of equality is constrained by the state action doctrine and the adjudicative model. Since the focus of judicial review for violations of the right to equality is on particular laws and not on the entire system of distribution, the courts are not free to structure the system as they see fit, ensuring that certain rights and goals in addition to equality are protected. The courts must look at the law before them and decide whether or not it should be struck down. If a law which adds to a group's existing disadvantage is necessary to the achievement of an important social end, it will be upheld, despite its adverse effect and despite the failure of the state to improve, in some other way, the lot of the disadvantaged group.

Remedial discretion may allow some flexibility. An element of accommodation may be required by the courts — for example, upholding the hard hat requirement but creating an exception to it for Sikhs. Occasionally, the courts may make affirmative orders; instead of striking down a law which excludes a particular group from its coverage, the court may order that the coverage of the law be extended to include the group (for example, build ramps or enforce a prohibition of gender discrimination in the amateur sports).[48]

The courts, though, are not in a position to alleviate the situation of a disadvantaged group by ensuring that other benefits are provided — adjusting other laws to ensure some compensation for the disadvantageous effect of the law in question (for example, providing special transportation facilities for the blind). Generally, the courts are limited to two choices. They can strike down the law in question, or they can uphold it. Because equality is pursued interstitially — focusing on particular laws rather than on the system of laws — the only way for the courts to provide for interests and values other than equality is to uphold the law and permit some disadvantageous effect. Justification on this basis is properly seen as a limitation on the right to equality under section 1. Issues of justification are external to the right to equality since the courts must balance equality (the wrong of additional social and economic disadvantage) against other values and interests represented by the disadvantageous law. Section 1 has a role to play in section 15 adjudication because of the political and structural constraints placed on the courts in their pursuit of equality of result.

VI. CONSTRUCTIVE DISCRIMINATION OR INTENTIONAL DISCRIMINATION?

Confined by the adjudicative model and the state action requirement, review for constructive discrimination strikes at only

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[48] Affirmative orders will be made in situations where the state has distributed some benefit but has excluded a certain group from the distribution. The court will decide to order that the scope of a law be extended to an excluded group (rather than that the law be struck down) when inclusion within the law's scope is something beneficial.

discrete, positive action taken by the state. No obligation is placed upon the state to take positive action to improve the lot of its citizens. The right requires only that "action" by the state be fair and balanced. A discrete wrong is remedied by the courts striking down the offending law or action.

However, the prohibition of constructive discrimination cannot be understood as simply a protection of the "liberty" of the individual from state interference. Review for constructive discrimination is a comparative right which does not fit comfortably within the boundaries of our traditional liberal conception of rights and freedoms. It is concerned with equality of result, the position of individuals in the community, and their access to social benefits and opportunities. It is simply constrained in the pursuit of this end by an adjudicative model which is designed for the protection of liberal rights. The doctrine of state action, the limited view of justification, and the focus on particular groups all give the right a liberal quality, so that it appears to be a slight extension of the prohibition of prejudice.

If we accept that equality involves more than freedom from invidious state action, should we then discard the barriers associated with the state action doctrine and the adjudicative model and recognize a more thorough-going equality of result?[49] The traditional model of constitutional adjudication creates a distorted view of equality and denies its deepest implications. However, there are reasons for holding fast to these limits on judicial review.

The adjudicative model and the state action doctrine reflect the institutional and political position of the courts. The avoidance by the courts of a thorough-going results-based right to equality is understandable given the indeterminacy of the requirements of equality. Equality of result is the product of the entire legal order and not of any particular law. The achievement of equality of result, although a flexible goal, involves a careful structuring of the legal order — so that adjustments can be made to compensate for disadvantages in some contexts and to allow for the recognition of goals other than equality. Were the courts to enforce a thorough-

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[49] A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281; O. Fiss, "Foreword: The Forms of Justice" (1979) 93 Harv. L. Rev. 1.

going equality of result, they would have to intervene wholesale into the legislative process leaving little scope for choice by the legislature. The courts' role would be complex and open-ended.

Even review for constructive discrimination may test the courts' institutional competence and threaten the legitimacy of judicial review. Review for constructive discrimination requires the courts to judge the appropriateness of laws which have a disproportionate impact on a disadvantaged group or which fail to satisfy the fundamental interests of a segment of the population. Judgments of this sort may be controversial and may have far-reaching consequences.

Perhaps, then, the courts should reject a results-oriented approach entirely (including review for constructive discrimination) and limit the right to equality in the *Charter* to a prohibition on prejudice-based decision making. The prejudice-based version of the equality right is attractive because it seems to draw a clear line between right and wrong, between actions which are consistent with the equality right and actions which violate the right. It is wrong when legislative or administrative decisions are made for reasons of prejudice. Regardless of its consequences, a legislative decision that is not improperly motivated will not be questioned by the courts. As long as the legislature is not intentionally treating some individuals as inherently less worthy or deserving than others, its decisions concerning the regulation of social life will be respected. Judicial intervention will be infrequent – with the courts most often finding a violation of the right in the actions of administrators rather than legislators. Recourse to section 1 will not be necessary, since a decision based on prejudice is a decision based on morally improper criteria and can never be reasonable and demonstrably justified.

However, as suggested above, the clear line appearance of prejudice-based discrimination is illusory. Prejudice is irrational, unthinking; by its very nature it is inarticulate and inexplicit. Discrimination rarely involves an act which is specifically intended to harm the interests of a particular group because that group is considered to be inherently inferior. The use of certain stereotypes may not involve an intention to harm or disadvantage, nor an intention to treat as less worthy and deserving than the remainder of the population; nevertheless, their use may involve an incorrect and damaging assumption about the group members.

The courts appear to avoid difficulties and maintain the integrity of the category of prejudice-based decision making by relying on objective indicators of intention. In determining whether prejudice has been a factor in a particular legislative act, the courts examine the relationship of the means chosen (the legislative category) to the legitimate ends claimed for the law. This assessment of means to ends requires that a court make a judgment about the value of certain ends and the utility of certain means. By looking at objective circumstances to discern intention and by automatically labelling certain things as prejudice (if the differentiation appears to be unreasonable, prejudice will be assumed), the courts perform a limited version of results-based review while maintaining the language of prejudice and subjective intention. This language preserves the claim that the decision is the vindication of a distinct and uncontroversial wrong, rather than a judgment about the fairness of the distribution of social benefits and burdens.

Beyond this, however, the prejudice-based view seems too narrow a conception of the right to equality. The principle of human equality which underlies the prohibition of prejudice-based decision making will support a deeper egalitarianism; a concern for the satisfaction of human needs and interests. It is difficult to contain the right to equality. The prohibition of prejudice is easily and inevitably transformed into an obligation to work equally for the benefit of all individuals, a form of equality of result.

The interpretation of section 15 as a prohibition of constructive discrimination places the right somewhere between a narrow protection against prejudice-based decision making by the state and an intrusive thorough-going assertion of equality of result. The prohibition is concerned with equality of result but limits the scope of its protection to the interests of certain historically disadvantaged groups. Because this interpretation is a middle ground (a compromise), it will be subject to a variety of pressures. In reviewing legislation for constructive discrimination, the courts may feel that they are doing too little, that considerable inequality remains untouched by their limited review, or they may feel that they are becoming too deeply involved in legislative decision making, that the role expected of them is not one they should perform. In any event, the courts will find it difficult to define the limits of their

review, particularly because of the synthetic character of concepts such as state action. The lines fixing the scope of the right to equality will be uncertain and unstable. The courts, though, may have no choice but to embrace this unstable compromise and to muddle through.

VII. CONCLUSION

The problems involved in interpreting section 15 illustrate a tension which runs through the *Charter*. The *Charter* performs two functions. It expresses the fundamental rights of our political community, and so plays an important symbolic role. The *Charter* also performs a practical function. It provides for the protection of the rights it proclaims. The *Charter* is a constitutional document which places responsibility on the courts to ensure that its rights are not violated by any act of the state. The courts are empowered to strike down laws which violate the rights set out in the *Charter*.

There are times when the functions of symbolic declaration and practical protection of rights are in tension. The general omission of "positive" or "socio-economic" rights from the *Charter* is an example of the "practical" function of the *Charter* taking precedence over the "symbolic" function. We may accept that each person has a right to the satisfaction of basic needs such as shelter, food, medical care, and education, but we may doubt that the courts are an appropriate institution to protect this right. Judicial review in aid of welfare rights is difficult because of the systemic considerations involved in the protection and advancement of these rights.

This may provide some explanation for the "liberal" bias of the *Charter*. Given the institutional character of the courts, supported by the traditional model of adjudication and the state action doctrine, the *Charter* is best used to protect "liberal" rights, guarding against invasions of individual liberty by the state. The courts are better able to judge the appropriateness or fairness of state interference with the freedom of citizens, than to assess the extent of the positive obligations the political community owes to its members. The legislature is left with the difficult task of structuring the social system in the fairest way.

A broad right to equality (a thorough-going equality of result) would involve an unlimited and unmanageable intrusion by the courts into the social order. But, if the right is interpreted in a restricted way as prohibiting and protecting the interests of certain groups in certain limited ways, what has become of the *Charter*'s symbolic role? Equality of result surfaces in review for constructive discrimination but its assertion is limited. The right appears to be concerned only with invasions of individual liberty or autonomy — discrete acts of wrong against individuals — and not with an important positive obligation the political community owes to its members.

There is a risk that this narrow interpretation of the right to equality may reinforce the limited view of equality that is held by certain groups in the community and may inhibit the emergence of a community which is more completely egalitarian. It is important that we recognize that the courts, through the interpretation and protection of the rights set out in the *Charter*, can play only a part in the elaboration of the fundamental obligations that the community owes to its various members. We can neither expect the courts to ensure that each and every human right is satisfied, nor forget that the primary responsibility for ensuring that society is just and fair to all its citizens falls upon our elected representatives.